

CITY ATTORNEY

2011 SEP -8 AM 11:19

KEN YUWILER (CSB No. 126525)
kyuwiler@shslaborlaw.com
MICHAEL SIMIDJIAN, ESQ. (CSB No. 251767)
msimidjian@shslaborlaw.com
SILVER, HADDEN, SILVER, WEXLER & LEVINE
1428 Second Street, Suite 200
P. O. Box 2161
Santa Monica, CA 90407-2161
(310) 393-1486 Telephone; (310) 395-5801 Fax
Attorneys for Cross-defendant Omar Rodriguez

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ, etc., et al.,

Plaintiffs,

vs.

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK; AND DOES 1 THROUGH
100, INCLUSIVE.

Defendants.

Case No. BC 414 602

**CROSS-DEFENDANT OMAR
RODRIGUEZ' BRIEF REGARDING
ALLEGED OUTSTANDING DISCOVERY**

Assigned to: Hon. Joanne B. O'Donnell

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK,

Cross-complainants,

vs.

OMAR RODRIGUEZ, an individual,

Cross-defendant.

Date: Under submission

Time: N/A

Dept: 37

Trial Date: July 11, 2012

I. CROSS-DEFENDANT OMAR RODRIGUEZ' POSITION REGARDING
"OUTSTANDING" DISCOVERY

This brief is filed in response to the Court's inquiry regarding the alleged outstanding

1 discovery apparently claimed by Cross-complainant City of Burbank which apparently consists of
2 further responses to Interrogatories no. 10 & 11, the deposition of witness Tina Gunn and the
3 desire to reopen the deposition of Cross-defendant Omar Rodriguez.

4 A. Further Responses to Interrogatories No. 10 & 11:

5 When SHSW&L took over representation of Omar Rodriguez as a Cross-defendant, this
6 issue had already been before the discovery referee. In that regard, there was an Amended 12th
7 Report and Recommendation of the Discovery Referee. On August 31, 2011, counsel for the City
8 asked if that report and recommendation had been addressed by the Court. Pursuant to the Court's
9 minute order of August 30, 2011 (which was mailed on August 31, 2011 and received from the
10 Court on September 6, 2011), the report and recommendation were signed by the Court. As a
11 result, further responses apparently are due by Cross-defendant Rodriguez and he will therefore
12 timely serve further responses.

13 B. Deposition of Tina Gunn

14 Apparently, the deposition of witness Tina Gunn was timely noticed prior to the discovery
15 cut-off and was also the subject of the Amended 12th Report and Recommendation of the
16 discovery referee. Regardless, Defendant/Counter-complainant City of Burbank noticed the
17 deposition for August 17, 2011. Recognizing that the issue had properly been before the discovery
18 referee and that it had been timely noticed, Counter-defendant Rodriguez noted that the deposition
19 was being taken after the discovery cut-off and the deposition occurred and was completed on
20 August 17, 2011.

21 (Indeed, the parties stipulated that the taking of that deposition would not be deemed to
22 reopen discovery or be a waiver of the discovery cut-off or change the status quo as it relates to
23 any other discovery matter (See, the communications between the parties, Exhibit "A" hereto).

24 One document apparently was sought by way of the deposition subpoena for Ms. Gunn's
25 August 17, 2011 deposition. Although the City apparently had already been given a copy of the
26 document (an audio tape) before the deposition, another copy was sought at the deposition.
27 Therefore, on August 17, 2011 (well after the discovery cut-off) the City served another deposition
28

1 subpoena claiming that it only wanted to inspect another copy of the document. However, when it
2 served the deposition subpoena it now sought to inspect two documents (the audio tape and the
3 envelope in which it came). As the City had previously been given a copy of both of those
4 documents before the deposition, it did not make sense to file a motion for a protective order based
5 on the expiration of the discovery cut-off. However, the City sought to conduct the inspection
6 without notifying Cross-defendant Rodriguez' counsel of the specific date and time that was set
7 such that Cross-defendant Rodriguez' counsel had to learn of the specific date and time of the
8 inspection from the witness' counsel. Worse, Cross-defendant Rodriguez' counsel arrived at the
9 designated date and time (September 2, 2011 at 9:30 a.m.) and waited 1.5 hours only to learn that
10 the Defendant/Cross-complainant City of Burbank's counsel was a no-show which resulted in an
11 abuse of the discovery process, caused Mr. Simidjian to waste his time to drive to Beverly Hills
12 and wait around for Ms. Savitt to attend (which she failed to do), and caused Cross-defendant
13 Rodriguez to incur unnecessary attorney's fees (See, September 2, 2011 letter, Exhibit "B" hereto.)

14 C. Reopening the Deposition of Omar Rodriguez

15 California Code of Civil Procedure Section 2024.020(a) provides that all discovery shall be
16 completed 30 days before trial and that all motions shall be heard no later than 15 days before the
17 date set for trial. This matter was first set for trial on August 25, 2010 but the trial date was
18 apparently advanced and vacated on May 21, 2010. Thereafter, after the cases were severed, the
19 trial regarding Omar Rodriguez was set for July 27, 2011. Fifteen days before July 27, 2011 is
20 July 12, 2011. Therefore, any motion to reopen Cross-defendant Rodriguez' deposition would
21 have had to be made no later than 16 court days before July 12, 2011, to wit, by June 17, 2011.

22 However, Defendant/Cross-complainant City of Burbank did not make a motion to reopen
23 Cross-defendant Rodriguez' deposition. Indeed, the issue was apparently first mentioned to the
24 discovery referee on June 28, 2011 and Defendant/Cross-complainant City of Burbank submitted a
25 letter brief on June 29, 2011 (a copy of that letter brief is attached hereto as Exhibit "C"). As
26 such, the request was untimely, is barred by the discovery and motion cut-offs, and should not be
27 considered.

1 (Presumably, the City will try to circumvent the discovery and motion cut-offs by seeking
2 to assert that it could not have made a motion because the JAMS fees had not been paid. Should
3 that assertion be made, however, it should be disregarded because there is no evidence that on by
4 June 17, 2011 the discovery referee was not addressing matters. Indeed, the Amended 12th Report
5 and Recommendation of the discovery referee was dated on July 11, 2011, almost a month after
6 the last date for the City to make a motion.)

7 Finally, the City's purported claim that a party has made contradictory statements (whether
8 true or not) does not entitle the party to reopen discovery. It merely can be used later to address
9 their argument regarding credibility.

10 II. CONCLUSION

11 The discovery cut-off has expired. Further responses to Interrogatory Nos. 10 and 11 will
12 be forthcoming pursuant to the Court's order. No other discovery should be allowed.

13
14 Respectfully submitted,

15 Dated: September 6, 2011

SILVER, HADDEN, SILVER,
WEXLER & LEVINE

16
17 By: 

KEN MUWILER
Attorneys for Cross-defendant Omar
Rodriguez

DECLARATION OF KEN YUWILER

I, Ken Yuwiler, declare:

1. I am an attorney with Silver, Hadden, Silver, Wexler & Levine, the attorneys of record for Cross-defendant Omar Rodriguez herein. It is my understanding that the only matter presently involving Omar Rodriguez in this case is the City's Cross-complaint against Cross-defendant Rodriguez.

2. On August 31, 2011, Larry Michaels, counsel for the City, asked the Court if the Amended 12th Report and Recommendation of the discovery referee had been addressed by the Court. Pursuant to the Court's minute order of August 30, 2011 (which was mailed on August 31, 2011 and received from the Court on September 6, 2011), the report and recommendation were signed by the Court. As a result, further responses apparently are due by Cross-defendant Rodriguez and he will therefore timely serve further responses.

3. Apparently, the deposition of witness Tina Gunn was timely noticed prior to the discovery cut-off and was also the subject of the Amended 12th Report and Recommendation of the discovery referee. Regardless, Defendant/Counter-complainant City of Burbank noticed the deposition for August 17, 2011. Recognizing that the issue had properly been before the discovery referee and that it had been timely noticed, Counter-defendant Rodriguez noted that the deposition was being taken after the discovery cut-off and the deposition occurred and was completed on August 17, 2011. However, the parties stipulated that the taking of that deposition would not be deemed to reopen discovery or be a waiver of the discovery cut-off or change the status quo as it relates to any other discovery matter (See, the communications between the parties, Exhibit "A" hereto).

4. One document apparently was sought by way of the deposition subpoena for Ms. Gunn's August 17, 2011 deposition. Although I understand that the City apparently had already been given a copy of the document (an audio tape) before the deposition, another copy was sought at the deposition. Therefore, on August 17, 2011, the City served another deposition subpoena claiming that it only wanted to inspect another copy of the document. However, when it served

1 the deposition subpoena it now sought to inspect two documents (the audio tape and the envelope
2 in which it came). As I understand that the City had previously been given a copy of both of those
3 documents before the deposition, it did not make sense to file a motion for a protective order based
4 on the expiration of the discovery cut-off. However, the attorney for the City sought to conduct
5 the inspection without notifying me of the specific date and time that was set such that I could
6 attend. Rather, I learned of the specific date and time of the inspection from the Ms. Gunn's
7 counsel. Worse, Mr. Simidjian of my office arrived at the designated date and time (September 2,
8 2011 at 9:30 a.m.) and waited 1.5 hours only to learn that the Defendant/Cross-complainant City
9 of Burbank's counsel was a no-show.

10 5. I understand that this matter was first set for trial on August 25, 2010 but the trial
11 date was apparently advanced and vacated on May 21, 2010. Thereafter, after the cases were
12 severed, I understand that the trial regarding Omar Rodriguez was set for July 27, 2011.
13 According to the code, any motion to reopen Cross-defendant Rodriguez' deposition would have
14 had to be made no later than 16 court days before July 12, 2011 (which is fifteen days before the
15 date set for trial), to wit, by June 17, 2011.

16 6. Defendant/Cross-complainant City of Burbank did not make a motion to reopen
17 Cross-defendant Rodriguez' deposition. Indeed, I understand that the issue was apparently first
18 mentioned to the discovery referee on June 28, 2011 and Defendant/Cross-complainant City of
19 Burbank submitted a letter brief on June 29, 2011 (a copy of that letter brief is attached hereto as
20 Exhibit "C"). I also understand that contrary to what is stated in the letter brief, there was no
21 agreement to abide by "the Referee's informal decision to resolve the issue of Omar Rodriguez'
22 [purported] refusal to appear for his deposition" (Exhibit "C", page 1.) Regardless, no motion was
23 made and even the June 28, 2011 or June 29, 2011 request would have been untimely. Therefore,
24 the City's request was untimely, is barred by the discovery and motion cut-offs, and should not be
25 considered.

26 ///

27 ///

7. Exhibits "A" through "B" herein are true and correct copies of documents preserved and maintained by my office in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California and that his declaration was executed on September 6, 2011, at Santa Monica, California.

KEN YUWILER

Ken Yuwiler

From: kyuwiler@shslaborlaw.com
Sent: Wednesday, August 17, 2011 11:30 AM
To: Michaels, Larry
Cc: von Grabow, Veronica; Linda C. Miller Savitt; Humiston, Carol Ann; kyuwiler@shslaborlaw.com; Michael Simidjian
Subject: RE: Rodriguez / Burbank Police Department - LASC Case No. BC414602

Mr. Michaels:

I am willing to look at the issues one issue at a time. I understand that the discovery cut-off and motion cut-offs have expired. Therefore, my initial opinion is that no further discovery or motions are proper, including the deposition of Tina Gunn. Regardless, I understand that you have a different opinion regarding the City's entitlement to proceed with discovery noticed or sought before the discovery cut-off.

In any case, in reliance on your e-mail and with the understanding that the the fact that Ms. Gunn's deposition goes forward also is not used to support either party's position, I'm okay with the proposed stipulation which is memorialized by these e-mails.

Ken Yuwiler
Silver, Hadden, Silver, Wexler & Levine
310-393-1486 (office)
310-892-2606 (cell)
310-395-5801 (fax)

This e-mail transmission is intended for the exclusive use of the individual or entity to whom it is addressed and may contain confidential information that is covered by the Electronic Communications Privacy Act, 18 USC Sections 2510-2521. If you are not the intended recipient (or an employee or agent responsible for delivering this e-mail to the intended recipient), you are hereby notified that any copying, disclosure or distribution of this information is strictly prohibited.

On Wed, 17 Aug 2011 10:24:11 -0700, "Michaels, Larry" wrote:
Ken,

>
> Everyone on our side agrees that the Gunn deposition does not reopen
> discovery, does not waive the discovery cut-off, and does not in any
> way change the status quo as to any other discovery matters. As I
> have told you, it is our position that we are still entitled to
> responses on our discovery that was properly initiated before the
> discovery cut-off, but which Mr. Gresen improperly refused to
> provide, including responses to Interrogatories 10 & 11 and resuming
> the deposition of Mr. Rodriguez. The taking of the Gunn deposition
> does not waive our position with respect to these issues, nor does it
> waive any objections you may choose to make in response to our
> position. If you want the foregoing to be reduced to a formal
> stipulation, please feel free to prepare one. However, I would accept
> a responsive e-mail, confirming your agreement with this e-mail, as
> establishing a binding stipulation as between us. I see no point in
> asking Mr. Gresen to join in this stipulation, since he rarely
> responds to our communications and rarely actually confirms
> stipulations in writing even if he agrees to them orally.
>
> Lawrence A. Michaels | Mitchell Silberberg & Knupp LLP | 11377 West
> Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3766 | fax:
> 310 231-8466 | lam@msk.com | www.msk.com THE INFORMATION CONTAINED IN
> THIS E-MAIL MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND

> CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS. THIS MESSAGE MAY BE AN
> ATTORNEY-CLIENT COMMUNICATION, AND AS SUCH IS PRIVILEGED AND
> CONFIDENTIAL. IF THE READER OF THIS MESSAGE IS NOT AN INTENDED
> RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY REVIEW, USE,
> DISSEMINATION, FORWARDING OR COPYING OF THIS MESSAGE IS STRICTLY
> PROHIBITED. PLEASE NOTIFY US IMMEDIATELY BY REPLY E-MAIL OR
> TELEPHONE, AND DELETE THE ORIGINAL MESSAGE AND ALL ATTACHMENTS FROM
> YOUR SYSTEM. THANK YOU.

> -----Original Message-----

> From: kyuwiler@shslaborlaw.com [mailto:kyuwiler@shslaborlaw.com]
> Sent: Wednesday, August 17, 2011 10:08 AM
> To: Michaels, Larry
> Cc: kyuwiler@shslaborlaw.com; von Grabow, Veronica
> Subject: RE: Rodriguez / Burbank Police Department - LASC Case No. BC
414602

> Thank you for your responsive e-mail.

> What is the response from counsel who is taking the deposition?

> Please advise. Thank you. Ken Yuwiler
> Silver, Hadden, Silver, Wexler & Levine
> 310-393-1486 (office)
> 310-892-2606 (cell)
> 310-395-5801 (fax)

> This e-mail transmission is intended for the exclusive use of the
> individual or entity to whom it is addressed and may contain
> confidential information that is covered by the Electronic
> Communications Privacy Act, 18 USC Sections 2510-2521. If you are not
> the intended recipient (or an employee or agent responsible for
> delivering this e-mail to the intended recipient), you are hereby
> notified that any copying, disclosure or distribution of this
> information is strictly prohibited. On Tue, 16 Aug 2011 17:15:40
> -0700, "Michaels, Larry" wrote:
> I see no problem with that, but I will need to confirm with
> co-counsel who is taking the deposition. I will get back to you
> tomorrow morning. >

> > -----Original Message-----

> > From: kyuwiler@shslaborlaw.com [mailto:kyuwiler@shslaborlaw.com]
> > Sent: Tuesday, August 16, 2011 4:53 PM
> > To: von Grabow, Veronica; Michaels, Larry
> > Cc: kyuwiler@shslaborlaw.com
> > Subject: Rodriguez / Burbank Police Department - LASC Case No. BC
414 > 602

> > Ms. von Grabow & Mr. Michaels:

> > I do not want to make a motion for protective order unless
> necessary. > However, given that the discovery cut-off has
> expired, will you > stipulate that if we allow the deposition of Tina
> Gunn which was > unilaterally noticed for tomorrow to proceed, the
> City will not > assert that allowing the deposition to proceed
> constitutes a waiver of > the discovery cut-off?

> > Please advise. Thank you. Ken Yuwiler Silver, Hadden, Silver,
> Wexler & Levine
> > 310-393-1486 (office)
> > 310-892-2606 (cell)
> > 310-395-5801 (fax)

> > This e-mail transmission is intended for the exclusive use of the >
> individual or entity to whom it is addressed and may contain >
> confidential information that is covered by the Electronic >
> Communications Privacy Act, 18 USC Sections 2510-2521. If you are not

> > the intended recipient (or an employee or agent responsible for >
> delivering this e-mail to the intended recipient), you are hereby >
> notified that any copying, disclosure or distribution of this >
> information is strictly prohibited.
>
>
>

SILVER, HADDEN, SILVER, WEXLER & LEVINE
A PROFESSIONAL LAW CORPORATION

STEPHEN H. SILVER
WILLIAM J. HADDEN
SUSAN SILVER
ROBERT M. WEXLER
RICHARD A. LEVINE
KEN YUWILER
ELIZABETH SILVER TOURGEMAN
HOWARD A. LIBERMAN
MICHAEL D. SCHWARTZ
MICHAEL SIMIDJIAN

1428 SECOND STREET
SANTA MONICA, CALIFORNIA 90401
MAILING ADDRESS
POST OFFICE BOX 2161
SANTA MONICA, CALIFORNIA 90407-2161
TELEPHONE (310) 393-1486
TELEPHONE (323) 870-0900
FACSIMILE (310) 395-5801

WORKER'S COMPENSATION
OF COUNSEL
STEVEN E. KAYE

September 2, 2011

COPY

Linda Miller Savitt, Esq.
Ballard Rosenberg Golper & Savitt LLP
500 N Brand Blvd 20th Fl
Glendale, CA 91203-9946

Re: Scheduled Inspection of Items Obtained from Tina Gunn

Dear Ms. Savitt:

I am writing to you in my capacity as the legal representative for Cross-Defendant Omar Rodriguez.

Your office issued a discovery subpoena on August 17, 2011 seeking to inspect the audio tape and the envelope in which it was enclosed which items are in the possession of Tina Gunn's counsel. At the time you served the subpoena, I told you that I intended to be present. Although the discovery cut-off has expired, and we filed objections, in the spirit of cooperation, we did not seek to prevent the inspection. I understand that you unilaterally made arrangements with Greg Smith, Tina Gunn's counsel, to conduct the inspection on Tuesday, August 30, 2011 at 9:30 a.m. I also understand that you requested the inspection be continued until today at 9:30 a.m. Although we are counsel for a party to the case, at no time did you bother to notify me or my office of those arrangements. Instead, I had to learn of the date and time of the inspection through Mr. Smith's office.

Today, Michael Simidjian of my office arrived at Mr. Smith's office at about 9:20 a.m., for the inspection. Thereafter, he proceeded to patiently wait for your arrival until 11:00 a.m. During this time, he was informed by Mr. Smith's assistant, Selma, that your office had not called Mr. Smith to say that you would be late. Indeed, when Mr. Smith's assistant called your office, she was told that you could not be located. At no time during Mr. Simidjian's 1.5 hour wait was he informed that you were en route or would be unable to attend the inspection. Later, after he left, we received a message from Mr. Smith's office that you were seeking to now set the inspection for sometime next week.

Your failure to include us in your efforts and your conduct this morning constitutes an abuse of the discovery process, caused Mr. Simidjian to waste his time to drive to Beverly Hills and wait around for you to attend (which you failed to do), and caused my client to incur unnecessary attorney's fees. While those issues can be addressed at a later time, I would

SILVER, HADDEN, SILVER, WEXLER & LEVINE

Linda Miller Savitt, Esq.
Ballard Rosenberg Golper & Savitt LLP
September 6, 2011
Page -2-

appreciate timely future communications from Defendants/Cross-complainants regarding matters relevant to this case.

Thank you.

Sincerely,

SILVER, HADDEN, SILVER,
WEXLER & LEVINE

KEN YUWILER

KY:clm

cc: Client
Lawrence A. Michaels, Esq.
Veronica T. von Grabow, Esq.
Carol Humiston, Esq.
Gregory W. Smith, Esq.
Solomon Gresen, Esq.

05834r-ltr.wpd

Veronica T. von Grabow
Attorney-at-Law
(310) 312-3208 Phone
(310) 231-8348 Fax
vttv@msk.com

MSK

June 29, 2011

VIA EXPRESS MAIL AND EMAIL

Honorable Diane Wayne (Ret.)
c/o Jason Feazell
Case Manager
JAMS
707 Wilshire Blvd.
46th Floor
Los Angeles, CA 90017

Re: Rodriguez, et al. v. Burbank Police Department, et al., LASC Case No. BC414602

Dear Judge Wayne,

This letter brief is submitted pursuant to the permission of the Referee granted during the telephonic hearing on June 28, 2011. During that hearing, all parties agreed to abide by the Referee's informal decision to resolve the issue of Omar Rodriguez's refusal to appear for his deposition as duly noticed for June 20, 2011.

As we will show in this brief, Burbank has a legitimate need to reopen Rodriguez's deposition to ask questions about the central issue in Burbank's cross-complaint for conversion – when and how Rodriguez stole confidential personnel documents from the Burbank PD, and what use he made of those documents.

Burbank was not able to ask those questions during Rodriguez's previous deposition sessions because Rodriguez perjured himself by denying that he had ever taken the documents in the first place. In his recent interrogatory responses, Rodriguez appears to have reversed that testimony and now admits that he did take at least some of the documents in question. Because Rodriguez has made a 180 degree about-face in his testimony regarding the central issue in the case, Burbank needs to ask the follow-up questions that it certainly would have asked if Rodriguez had told the truth in his prior deposition testimony.

By denying that he had taken the stolen documents, Rodriguez precluded Burbank from asking any follow-up questions about when and why he took the documents, how he obtained them, how he removed them from the Burbank PD, or what he did with them. This discovery is critical

Exhibit C
Page 1 of 6

to Burbank's cross-claim. Rodriguez should not be rewarded for his perjury by being permitted to use that perjury to evade Burbank's legitimate discovery.

A. Rodriguez's Changing Testimony About The Stolen Documents.

When Plaintiffs made their first document production in this case, in July 2009, the production included numerous confidential personnel records of *other* police officers. Burbank obtained an order from the court requiring Plaintiffs to return these documents, and then filed a cross-complaint against Omar Rodriguez for conversion, based on the allegation that Rodriguez had stolen the documents from the Burbank PD.

Ever since that time, Burbank has been trying to get Plaintiffs (in particular, Omar Rodriguez) to explain how they obtained the stolen documents. Rodriguez has repeatedly changed his sworn testimony on that issue. Initially, Rodriguez testified in deposition that he had taken the documents:

Q. BY MS. SAVITT: Let me try it this way. You have produced some documents which are Bates-stamped OR- -- I have copies here -- -0401 through -0585. I'm going to just show you the documents and ask you how you came in possession of those documents.

MR. GRESSEN: Take a look at them. -0401 through?

Q. BY MS. SAVITT: Where did you get the documents from, sir?

A. Those documents -- several of them, I produced them.

Q. I --

A. Some of them, I didn't. They all came from the Burbank Police Department.

Q. Okay. But how did you get possession of them to produce them?

A. They were in my possession.

Q. Okay. Are you -- you're currently on administrative leave; correct?

A. Yes.

Q. And you were placed on administrative leave on April 15, 2009?

A. Yes, ma'am.

Q. And when you were placed on administrative leave, what items were you permitted to take from the station?

A. I'm assuming anything that was in my possession, in my briefcase.

Q. Were these documents in your briefcase?

A. *Yes, they were.*

Deposition of Omar Rodriguez, 10:20-11:25 (attached to the von Grabow Decl. as Exhibit A) (emphasis added).

Later, Rodriguez did a 180 degree about-face on his testimony, stating under oath that he did *not* take the documents from the Burbank Police Department:

Q. BY MS. SAVITT: I thought you said they were in your briefcase on April 15, 2009, when you left the Burbank Police Department?

A. That's what I wanted to explain. I think there's some -- I think there's been a miscommunication. I may have misspoken. I don't know what's been mis- - basically it's misunderstood. But I have been in possession of those documents from the time that they were made all the way through April 15th of 2007 (sic). They've been in and out of my possession. I've had them in my briefcase. I've had them in my car. I've had them in my locker. They've -- they've been in several areas of the police department with me, and I've put them there. But when I left on April 15, 2009, when I was placed on administrative leave, I did not have any of those documents with me, in my home, in my car, any person. I don't know any people that I gave them to. Nobody had them that I'm aware of. That's what I'm telling you.

Q. But the original packet of documents I showed you, you had in your briefcase on April 15, 2009?

A. I believe I did. *But when I left my office when I was walked out by Captain Lynch and Captain Varner, I did not have those -- any of these documents that you're showing me that have been produced in my possession.*

Q. *Including the first batch I showed you, -0401 through -585?*

A. *That's correct.* And I think that's where the misunderstanding -- if I said that -- if I said -- I can't remember right now. *If I said that I actually took them with me from the station, I misspoke.* I had taken them prior to that. I had taken them with me.

Deposition of Omar Rodriguez, 43:22-45:4 (von Grabow Decl., Exhibit A) (emphasis added).

Burbank then served interrogatories, asking how the documents had been obtained. After Plaintiffs' initial refusal to respond to those interrogatories, Burbank moved to compel responses. Based on the Referee's recommendation, the Court ordered Plaintiffs to respond. Plaintiffs provided responses which were still inadequate, because they were not verified by all Plaintiffs; and because they used the ambiguous term "responding party" to identify who took the documents, without stating which of the three responding parties they were talking about. That led to Burbank's second motion to compel responses, which was the subject of the telephonic hearing on June 28, 2011.

Although Plaintiffs revised responses were ambiguous, they strongly suggested that Rodriguez had been the one who took many of the documents from the Burbank PD. The revised response to Interrogatory No. 10 stated:

The source from which the responding party or his agents obtained originals or copies of any return/destroyed documents is as follows: *The responding party received as many as 10 bankers boxes filled with personal effects and documents from Lt. John Murphy. The responding party is informed and believes that the majority of the documents responsive to this interrogatory were contained in those boxes. In addition, documents responsive to this request were obtained from the Burbank Police Department during the responding party's tenure as a police officer, prior to April 15, 2009. The remainder of the identified documents were delivered anonymously, including, without limitation, any anonymous letters.*

Supplemental Responses to Special Interrogatories Nos. 10 & 11 (von Grabow Decl., Exhibit B) (emphasis added).

B. Burbank Has A Legitimate Need To Ask Follow-Up Deposition Questions In Light Of Rodriguez's Supplemental Interrogatory Responses.

Now that Rodriguez (assuming that he is the "responding party") has admitted that he "obtained" documents from the Burbank PD, Burbank has legitimate follow-up questions which it could not have asked when Rodriguez was denying that he was in possession of any of the stolen documents. These include:

When did you remove the documents from the PD?

Why did you remove the documents from the PD?

Did you give copies to anyone else? Did you show the documents to anyone else?

How did you come into possession of the documents while working?

In addition, Burbank has legitimate questions about the *other* methods by which Rodriguez obtained the stolen documents, as reflected in the Supplemental Interrogatory responses. For example, the Supplemental responses claim that some of the documents "were delivered anonymously." This is the first time that Rodriguez has ever advised Burbank of this assertion. Burbank has a right to inquire as to when these documents were delivered, and under what circumstances.

Rodriguez also claims that some of these confidential documents were delivered to him by Lt. John Murphy. This directly contradicts Murphy's testimony, which was that Murphy returned

Rodriguez's personal belongings to Rodriguez, but not any of the stolen documents. Murphy testified:

Q Okay. So did you personally sort through every document in the office to identify Omar's personal items from police department documents?

A Both Thor and I looked through the files to see what belonged to him and what didn't.

Q Okay. Did you give Omar Rodriguez any city documents when you put together his personal documents?

A No, not that I am aware.

Q Did you give him any memos, copies of internal affairs investigations, policy manuals -- anything of that nature?

A Not that I'm aware of.

Q Did you give him any comment cards of officers?

A Not that I'm aware.

Q Did you give him any police rankings?

A Police rankings?

Q Yeah. Promotional rankings, you know, test results?

A Not that I'm aware.

Q So before you turned over the documents to Lieutenant Rodriguez, you had Captain Varner also go through them with you to make sure that you were just giving him his personal documents?

A Yes. And I had Sergeant Misquez, M-i-s-q-u-e-z.

Q So Sergeant Misquez also went through the documents?

A Yes, ma'am.

Q Now, did you personally then deliver the personal documents of Omar Rodriguez to Omar Rodriguez?

A Yes, ma'am. I delivered the -- what was allowed to go.

Deposition of John Murphy 128:18-130:18 (von Grabow Decl., Exhibit C).

Finally, Burbank is entitled to ask Rodriguez about the memo he sent to Burbank Police Captain Craig Varner, on August 3, 2009, in which Rodriguez stated:

"I am not in possession of any confidential employee records, or other confidential documents, belonging to the Burbank Police Department."

Rodriguez Memo. (von Grabow Decl., Exhibit D). As it is now apparent that this statement was a deliberate lie, Burbank will rely on this memo at trial to support its claim for punitive damages. If Rodriguez has any explanation for this lie, Burbank is entitled to discovery as to his explanation in advance of trial.

C. Rodriguez Refuses To Appear For His Duly Noticed Deposition.

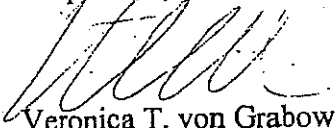
On June 8, 2011, Burbank timely served notice of Rodriguez's deposition for June 20, 2011. (von Grabow Decl. ¶ 6, Exhibit E). On June 13, 2011, Rodriguez's counsel notified Burbank that Rodriguez was unavailable and would not appear for his deposition as noticed. Later that same day, Burbank's counsel sent an email to Rodriguez's counsel requesting the reason for Rodriguez's unavailability and alternate dates when he would be available. (von Grabow Decl., Exhibits F and G).

Nearly two weeks passed, and Rodriguez's counsel did not provide any response to Burbank's request. On June 24, 2011, Burbank's counsel again requested Rodriguez's counsel provide dates for Rodriguez's deposition. At that time, Burbank's counsel was informed that Rodriguez's counsel was out of the office and would not respond until the following week. On June 27, 2011, Rodriguez's counsel finally responded to Burbank's request. Rather than provide dates for Rodriguez's deposition, however, Rodriguez's counsel notified Burbank that Rodriguez refused to appear for deposition. The only reason given for Rodriguez's refusal is that his counsel "do not believe further deposition is appropriate at this time" because they "do not believe the expense is warranted or justified." (von Grabow Decl., Exhibits H and I).

D. Conclusion

Burbank respectfully requests the Referee establish a date she is available to preside over Rodriguez's deposition and direct the parties to appear for that deposition. The deposition will be short as there are not many questions Burbank intends to ask. Fairness demands that Burbank be allowed to ask Rodriguez questions about the central issue in Burbank's cross-complaint for conversion -- when and how Rodriguez stole confidential personnel documents from the Burbank PD, and what use he made of those documents. Rodriguez should not be rewarded for his perjury by being permitted to use that perjury to evade Burbank's legitimate discovery.

Respectfully submitted,



Veronica T. von Grabow
MITCHELL SILBERBERG & KNUPP LLP

Enclosures (via express mail only)

cc: Solomon Gresen, Esq.

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161,
Santa Monica, California 90407-2161.

5 On September 6, 2011, I served the foregoing document described as **CROSS-**
6 **DEFENDANT OMAR RODRIGUEZ' BRIEF REGARDING ALLEGED OUTSTANDING**
7 **DISCOVERY**, on the parties in this action by giving a true copy thereof to the representative of
each of the parties set forth below:

8 **SEE ATTACHED SERVICE LIST**

9
10 ☒ [XX] [By Mail] I am readily familiar with the firm's practice of collection and processing
11 correspondence for mailing. Under that practice, on the same day that correspondence is
12 placed for collection and mailing, it would be deposited with the U.S. Postal Service with
13 postage thereon fully prepaid at Santa Monica, California, in the ordinary course of
business. I am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date of deposit for
mailing in affidavit.

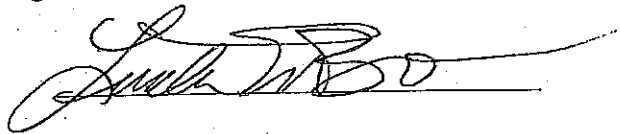
14 ☐ [] [By Personal Service] I delivered the above-entitled document to the representative of
15 the person identified hereinabove who attended the ex parte proceeding.

16 XX STATE I declare under penalty of perjury under the laws of the State of California
17 that the above is true and correct.

18 FEDERAL I declare that I am employed in the office of a member of the bar of this
19 court at whose direction the service was made.

20 Executed on September 6, 2011, at Los Angeles, California.

21 LINDA BORNMAN



SERVICE LIST

Plaintiff's counsel:

Solomon E. Gresen, Esq.
Steven V. Rheuban, Esq.
Law Offices of Rheuban & Gresen
15910 Ventura Boulevard, Suite 1610
Encino, California 91436

Defendant City of Burbank's counsel:

Lawrence A. Michaels, Esq.
Veronica von Grabow, Esq.
Mitchell, Silberberg & Knupp LLP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683

Linda Miller Savitt, Esq.
Ballard, Rosenberg, Golper & Savitt, LLP
500 N. Brand Blvd., Twentieth Floor
Glendale, CA 91203-9946

Carol A. Humiston, Esq.
Senior Assistant City Attorney
City of Burbank
275 E. Olive Ave.
Burbank, CA 91510